INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and resolution involved	3
Statement	3
Argument	12
Conclusion	19

CITATIONS

Cases:

Barenblatt v. *United States*, 360 U.S. 109 ..... 3, 13, 14, 15, 16, 18

Braden v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960 18

Deutch v. *United States*, No. 233, this Term, pending on petition for a writ of certiorari .. 3

Liveright v. *United States*, No. 328, this Term, pending on petition for a writ of certiorari .. 12, 13, 16

Russell v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari .. 16, 17, 18

United States v. *Bryan*, 339 U.S. 323 13

Whitman v. *United States*, No. 300, this Term, pending on petition for a writ of certiorari .. 12

Wilkinson v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 960 18

Constitution and statutes:

U.S. Constitution:

First Amendment 2, 7, 12, 13, 16

Fifth Amendment 10

Legislative Reorganization Act of 1946, c. 753, Title I, Section 134, 60 Stat. 832 (2 U.S.C. 190b(b)) 2, 3, 13

2 U.S.C. 192 3

Miscellaneous:

Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee of the Judiciary, U.S. Senate, 84th Cong., 1st Sess.: Page

Part 14 4

Part 17 ..... 4, 7, 8, 14

S. Rept. 131, 85th Cong., 1st Sess 7

S. Res. 366, 81st Cong., 2d Sess 2, 3, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 331

WILLIAM A. PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–19) has not yet been reported. The opinion of the district court (J.A. 136–137; Pet. 17–18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. 20). On July 13, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 17, 1960, and the petition was filed on August 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366 of the 81st Congress is sufficiently clear to authorize the Internal Security Subcommittee to ask the questions which petitioner refused to answer.

2. Whether the Subcommittee was legally authorized to hold the particular hearing at which petitioner was questioned in view of the provisions of the Legislative Reorganization Act of 1946 that no committee can sit without special leave while the Senate is in session.

3. Whether the First Amendment protected petitioner in refusing to answer the questions.

4. Whether, when petitioner appeared before the Subcommittee, he raised the issue of pertinency so as to require the Subcommittee to apprise him of the subject under inquiry and the pertinency of the questions to this subject.

5. Whether the indictment was invalid because it did not specify the subject under inquiry or the pertinency of the questions to that subject, and did not allege that petitioner's failure to answer was wilful.

6. Whether petitioner, who was indicted by a grand jury composed, in part, of Federal Government employees, is entitled to a hearing on general allegations that such jurors are biased as a result of the government security program.

7. Whether the rulings of the trial court denied petitioner the right of cross-examination and a fair trial.

STATUTES AND RESOLUTION INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of (August 2,) 1946, c. 753, Title I, Section 134, 60 Stat. 832 (2 U.S.C. 190b(b)); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in Appendix C to the petition, pages 21–22. In addition, Section 2 of the Resolution states:

> The Committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * *.

STATEMENT

Petitioner was charged in an eight-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer eight questions, pertinent to matters under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1). Having waived his right to trial by jury, petitioner was found guilty by the district court on all eight counts. He was sentenced to three months' imprisonment and to pay a fine of five hundred dollars (J.A. 11). On appeal, petitioner's conviction was affirmed[1] (Pet. 20).

[1] The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases, until after this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109. Petitions for certiorari have been filed in all six cases in which the convictions were affirmed. See the Government's Brief in Opposition in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Subcommittee, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws, heard Winston Burdett, a newspaperman and broadcaster, who had been a member of the Communist Party from 1937 until the early 1940's, testify concerning Communist infiltration of communications media.[2] He stated that, after he had become a Party member, Party leaders had induced him to become a foreign correspondent for a major American newspaper and to use that position as a cover for military espionage for the Soviet Union. Subsequently, the Subcommittee convened hearings to explore matters stemming from Mr. Burdett's testimony (Hearings, Part 17, p. 1587).

Julian G. Sourwine, counsel of the Subcommittee, a member of the staff of the Committee on the Judiciary for more than ten years, testified with reference to the information the Subcommittee possessed which caused petitioner to be subpoenaed. The Subcommittee had information that petitioner, a newspaperman, had been a candidate for vice president of the New York Newspaper Guild in 1949 on the so-called "Rank and File" ticket, which was known to be the Communist-supported ticket or slate (J.A. 50–51, 100–101), and that Communists had successfully infiltrated the Guild (J.A. 53, 100–102). According to Mr. Sour-

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[2] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate (hereinafter "Hearings"), 84th Cong., 1st Sess., Part 14, pp. 1323–1363.

wine, the Subcommittee knew that a statement in defense of the Communist Party appeared in the "Daily Worker" in 1941 and had been signed by a William Price (J.A. 53); that petitioner had received numerous visits from Marcella Hitschmannova, who was known to be a Communist courier and to have served the Communist movement in other capacities for years (J.A. 52–53, 65, 96–97);[3] that these visits were continuing up until the time petitioner was called as a witness (J.A. 65); that petitioner, after returning from wartime naval service, had flown an airplane on a trip to Central and South America, during which time he was accompanied by a courier for the Communist Party (J.A. 54–55, 65). The Subcommittee, however, had no information that directly showed petitioner to be a member of the Communist Party (J.A. 55).

On the basis of this information, the Subcommittee decided to call petitioner as a witness in executive session. Pursuant to subpoena, petitioner, together with counsel, appeared and testified at such a session held in New York City on December 7, 1955 (J.A. 55). At the executive session, petitioner initially answered several questions as to his identity and background (J.A. 72–74), but refused to furnish any information sought by the Subcommittee concerning the information possessed by the Subcommittee which is described above (J.A. 76–79).

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[3] The Subcommittee also had other information concerning petitioner and Marcella Hitschmannova which could not be described at the trial because of its highly confidential nature (J.A. 52, 54–55).

Petitioner refused to answer these questions on the basis of a lengthy legal memorandum (Gov. Ex. 3; J.A. 25–34). Petitioner's objection was that the Subcommittee was invading "my political beliefs, my religious beliefs, any other personal and private affairs, and my associational activities" protected by the First Amendment (J.A. 26). His remaining objections were based on separation of powers and the bill of attainder clause of the Constitution.

After petitioner had completed his testimony in executive session, the Subcommittee and its counsel were convinced that petitioner possessed information which he was withholding and, further, that such information would be useful to the Subcommittee in its investigation. This conviction was predicated upon a number of factors, such as the actual testimony given, the testimony apparently withheld, the manner in which petitioner withheld it, his "constant conferring with counsel about the questions which a man who had no information would find no difficulty in answering promptly," and his demeanor during the questioning (J.A. 85–86). The Subcommittee and its counsel were hopeful that petitioner, "if we called him back and went at it right, would come clean and give the committee the information that we wanted," as had other witnesses before the Subcommittee in other instances (J.A. 90). The Subcommittee believed that petitioner "had information which if true made it clear that Mr. Price had a great deal of information

over and above and beyond what we had, which would be of value to the committee" (J.A. 90–91).[4]

On January 4, 5, and 6, 1956, the Subcommittee held public hearings to continue its inquiry into Communist infiltration into the American press. At the start of these hearings on January 4, the Chairman stated (Hearings, Part 17, p. 1587):[5]

> The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. These facts did not in any way decrease the importance of carrying forward the investigation with diligence, care, and devotion to duty. The present hearings open up as a subsequent chapter to the Burdett testimony of June 28 and 29, 1955.

Senator Hennings then declared that the inquiry was "not in any sense an attack upon the free press of the United States," that "the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency," and that the inquiry was "not an attack upon any one

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[4] The importance the Subcommittee placed on information believed to be possessed by petitioner can be seen from the references to petitioner in the annual report of the parent Committee. S. Rep. 131, 85th Cong., 1st Sess., pp. 4, 102–103, 238, 242, 250, 253–255.

[5] Part 17 of the Hearings was introduced at the trial as Government Exhibit 8.

newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" (*id.*, p. 1588). The Chairman concurred in this statement and then reiterated (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Petitioner, together with the same counsel who had represented him at the time of the executive session, appeared before the Subcommittee on the next day, January 5, 1956. Petitioner testified concerning his employment as a newspaper reporter and past service as a naval aviator (J.A. 17–18). He refused to answer whether he had been a candidate for vice president on the "Rank and File" slate of the New York Newspaper Guild in 1949 (J.A. 18–19). This refusal, as well as petitioner's subsequent refusal to answer other questions, was based upon the same legal memorandum which he had submitted to the Subcommittee at the executive session (J.A. 19).

Petitioner was then asked whether he was at that time a member of the Communist Party (count 1) (J.A. 23). Petitioner, after consultation with his counsel, refused to answer the question on the basis

of the written memorandum which he relied on at the executive session, and "further on the grounds that no legislative purpose can be served by asking me, at this time again, questions, the answers to which this committee knows full well from the executive hearings" (J.A. 23). Petitioner likewise refused to answer whether he had "ever attended Communist meetings" (count 2) (J.A. 35):

> * * * on the grounds stated in my objection and on the further grounds that no legislative purpose can be served by asking this question again, inasmuch as the reply has already been elicited by this committee in executive session.

For these same reasons, petitioner refused to answer whether he knew Marcella Hitschmannova (count 3) (J.A. 36). The Subcommittee's counsel then informed petitioner of the Subcommittee's interest in the subject of this question: "Do you know, Mr. Price, that one Marcella Hitschmannova, now connected with the United Nations, was a courier for the Communist Party?" (J.A. 36). Petitioner persisted in his refusal (J.A. 37).

Petitioner declined to answer a question as to whether he had ever flown an airplane for or at the direction of the Communist Party. His refusal was based on his previously stated grounds and for the reason that he answered such a question in the executive session (J.A. 38). When asked whether he had ever flown outside the continental limits of the United States, he admitted that he had done so as a pilot for the United States Navy (J.A. 39). Upon being confronted with the transcript of the executive session—where he initially answered this question in the nega-

tive, and upon being informed of the reason for the question, then refused to answer—petitioner contested the accuracy of the record (J.A. 40). After a colloquy at the public session between petitioner and the Chairman, petitioner ultimately admitted without qualification that he had flown outside the continental limits of the United States (J.A. 41).

Thereupon, petitioner was asked whether he had ever flown "considerable mileage in Central America and Latin America" (count 4). He refused to answer "on the grounds previously stated" (J.A. 41). For the same reason he refused to answer whether he had flown a privately owned airplane in South America and had another person along with him (count 5) (J.A. 41–42). Asked whether the person who accompanied him on that trip was a courier for the Communist International, petitioner at first noted that a similar question had been asked of him in the prior executive session (J.A. 42). Upon being directed to answer, petitioner responded by giving his answer in the negative (J.A. 42). Thereupon, the Subcommittee inquired (count 6) (J.A. 43):

> For the sake of testing the credibility of your answer to that question, I ask you this: Who was the person who accompanied you on that lengthy flight in Latin and Central America?

Petitioner stated that he "would like to know what right the committee has in testing my credibility" (J.A. 43). Upon being directed to answer the question, petitioner refused "on the same grounds as previously stated" (J.A. 43). He disclaimed any claim of right or privilege under the Fifth Amendment (J.A. 43).

As the public session was about to close, petitioner made a lengthy statement in which he denied that he had (J.A. 44):

> * * * ever been involved in such an activity as suggested here in any way whatsoever at anyone's direction, at the direction of any of the organizations as were mentioned in the closed hearings, or any such organizations; that anyone who ever flew with me was ever engaged in such an activity; that I ever had knowledge of such activity; or that I was ever approached to participate in such an activity; * * *.

The counsel for the Subcommittee then stated (J.A. 44):

> I think, in view of this question, Mr. Chairman, this statement by the witness again, we should have a question, or perhaps several questions, going to the credibility of the statement.

Committee counsel then asked petitioner when he had "made this lengthy trip to Latin and Central America" (count 7) (J.A. 44). Petitioner declined to answer the question "on the grounds stated in the objection, and on the additional grounds that my credibility as a witness is not at question here" (J.A. 44).

Petitioner thereafter answered a series of further questions related to his unsolicited statement, admitting only that he had taken a trip to South America at his own direction in order to sell an aircraft and to do some free-lance stories along the way (J.A. 45). He testified that the airplane was his own and that he sold it to someone whose name he did not recall in Panama City who he believed was a resident of Panama or a United States resident

of the Canal Zone. Petitioner also testified that he contacted the buyer through an advertisement in a Panama City newspaper, and that he went to Panama to sell the airplane because he had heard there was a good market for airplanes in Central America (J.A. 45–47). Finally, petitioner was asked and refused to answer whether he had ever been a member of the Communist Party (count 8) (J.A. 47).

ARGUMENT*

1. Petitioner contends (Pet. 7) that "the grant of authority to the [Subcommittee] is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area." It is clear from the statements of the Subcommittee's Chairman and another member of the Subcommittee that, at the time petitioner appeared in public session, the Subcommittee was investigating Communist infiltration of the press (see the Statement, *supra*, pp. 7–8). As we show in our Brief in Opposition (pp. 9–12) in *Whitman* v. *United States*, No. 303, this Term, pending on petition for a writ of certiorari, Senate Resolution 366, 81st Cong., 2d Sess., clearly authorizes the Subcommittee to investigate this subject.

2. Petitioner asserts (Pet. 11) that the Subcommittee, when petitioner appeared before it, was not

* Petitioner's contentions are generally the same as those in *Liveright* v. *United States*, No. 328, this Term, pending on petition for a writ of certiorari. Therefore, this brief will refer to our Brief in Opposition in *Liveright* except where the issues involve the particular facts of this case or where our Brief in Opposition in *Liveright* itself refers to another brief.

a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. 21) provides that "[n]o standing committee of the Senate * * * shall sit, without special leave, while the Senate * * * is in session." As we show in our Brief in Opposition (pp. 11–12) in *Liveright* v. *United States*, No. 328, this contention is without merit because, first, petitioner failed to object to the constitution of the Subcommittee when he appeared before it (see *United States* v. *Bryan*, 339 U.S. 323, 330–335) and, second, Section 2 of Senate Resolution 366, *supra*, p. 3, specifically provides that the Subcommittee may sit while the Senate is in session.

3. Petitioner argues (Pet. 2, 9–11, 11–13) that his rights under the First Amendment were violated because the Subcommittee was investigating Communist infiltration of newspapers, the government failed to show probable cause for compelling petitioner to testify, and the government failed to show why petitioner's right of privacy must be subordinated to governmental interests. Application, however, of the rulings of this Court in *Barenblatt* v. *United States*, 360 U.S. 109, to the facts of this case demonstrates that petitioner's claims cannot be sustained.

First, *Barenblatt* decided that congressional committees can investigate Communist infiltration of education, an area likewise protected by the First Amendment. It therefore follows that the Subcommittee's investigation of Communist infiltration of the press is not constitutionally prohibited. Second, the Court suggested in *Barenblatt* that congressional committees cannot engage in "indiscriminate dragnet procedures,

lacking in probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee." 360 U.S. at 134. But the evidence in this case shows that, before petitioner was called to testify, the Subcommittee had considerable information about petitioner's participation in Communist or Communist-supported activities and close association with two Communist couriers even though no evidence directly showed petitioner to be a Party member (see the Statement, *supra*, pp. 4–5). From this information, the Subcommittee had probable cause to believe that petitioner could contribute to its investigation. Even if petitioner himself turned out not to be a Party member, he could likely provide the Subcommittee with information on Communist activities and persons with whom he had been connected. And, lastly, the Subcommittee's knowledge of Communist infiltration of the press (see the Statement, *supra*, p. 4)—which was confirmed by the testimony of other witnesses at the hearing at which petitioner appeared (Hearings, Part 17, pp. 1636, 1638–1640, 1739–1740, 1777, 1779)—coupled with its probable cause for belief that petitioner possessed information on this subject, clearly justifies the same conclusion this Court found in *Barenblatt*. "[T]he balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended." 360 U.S. at 134.

4. Petitioner argues (Pet. 7–9) that, at the time he appeared before it, the Subcommittee was not en-

gaged in a subject under inquiry which was sufficiently identified and of which petitioner was adequately apprised.

The record clearly shows that, at the outset of the hearings on January 4, the Chairman of the Subcommittee and Senator Hennings stated repeatedly that the subject of the hearing was Communist infiltration of the press. These statements, however, were not repeated at the time petitioner appeared before the Subcommittee on January 5. But petitioner, having failed to raise the issue of pertinency when he appeared before the Subcommittee, cannot raise it for the first time at his trial for contempt.

Petitioner's lengthy statement of legal argument and authorities (Gov. Ex. 3; J.A. 25–34), which was obviously prepared by or at least with the help of his counsel, justifies petitioner's refusal to answer entirely on the basis of various constitutional grounds (see the Statement, *supra*, p. 6). The only suggestion of an objection to pertinency is the statement that petitioner "might wish to * * * challenge the pertinency of the question to the investigation"[7] (J.A. 33). Considering the same statement in a substantially similar legal memorandum,[8] this Court in *Barenblatt*, 360 U.S. at 124, held that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, * * * buried * * * in the

[7] This statement demonstrates that petitioner knew how to object to the pertinency of the questions if he was actually in doubt and wished to base his objections on this ground.

[8] See page 234 of Record in *Barenblatt*, No. 35, Oct. Term, 1958.

context of [the witness'] general challenge to the power of the Subcommittee." Therefore, here, as in *Barenblatt*, the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the question. *Ibid.*

5. Petitioner contends (Pet. 3, 13) that the indictment was invalid because it failed (a) to specify the subject under inquiry or the pertinency of the questions and (b) did not allege that petitioner's refusal to answer was wilful.

a. The indictment stated simply in the words of the statute, that the defendant unlawfully refused to answer "questions which were pertinent to the question then under inquiry" (J.A. 1). As we have shown in our Brief in Opposition (pp. 8–10) in *Russell* v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari, this form of indictment—simply charging the defendant in the statutory language—is supported by substantial judicial authority. Moreover, petitioner was not compelled by the general allegation to guess as to the subject under inquiry or the pertinency of the questions. If petitioner was in any doubt as to the subject under inquiry or the pertinency of the questions, he could have easily moved for a bill of particulars.

b. Petitioner's contention concerning the failure of the indictment to allege wilfulness is answered by our Brief in Opposition (pp. 18–19) in *Liveright* v. *United States*, No. 328.

6. Petitioner further contends (Pet. 3, 13) that he was entitled to a hearing into the bias of Federal Government employees on the grand jury on the basis of

allegations that these jurors are biased as a result of the government security program. But as we have shown in our Brief in Opposition (pp. 5–8) in *Russell* v. *United States*, No. 239, this Term, a defendant is not entitled to a hearing to show bias on the part of grand jurors unless, at the least, his motion and accompanying affidavit allege specific, individual, and strong bias in particular grand jurors—allegations which he would ultimately have to prove to have the indictment dismissed. Petitioner, however, has alleged only opinions that there exists among government employees *in general* fear of loss of employment as security risks as to make it likely that any individual government employee would be afraid to vote against the return of an indictment in any case connected with Communism.

7. Petitioner attacks (Pet. 9–11) the trial court's order quashing subpoenas directed at the Subcommittee's files and sustaining objections to his cross-examination of the Subcommittee's counsel as to the identity of a confidential informant and information in the Subcommittee's files (J.A. 10, 48–49, 83, 93–95, 98, 99–100). Petitioner reasons that these actions prevented him from showing that the Subcommittee did not have probable cause to call him before it (see *supra*, pp. 13–14).

This same contention is answered in our Brief in Opposition (pp. 20–21) in *Liveright* v. *United States*, No. 328. As in that case, the Subcommittee's counsel testified at length on both direct and cross-examination concerning the information possessed by the Subcommittee as to petitioner's participation in Communist or Communist-supported activities and close association with Party members (J.A. 51–55, 65, 96–102) and refused to disclose only the files of the Subcommittee and highly confidential information (J.A. 48–49, 83, 93–95, 98, 99–100).*

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* Petitioner suggests (Pet. 13) that certiorari should be granted because several of the issues raised by his petition are now before the Court in *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926, and *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960. Although several of the issues are in fact common to this case and the two pending cases, we submit that the earlier cases do not provide any basis for asking this Court to grant this writ or even to withhold action.

One of the issues raised by petitioner—whether the indictment must specify the subject under inquiry—is also involved in *Braden*. But while we cannot, of course, be certain of the reasons why the Court granted certiorari in that case, we believe that this issue is without substance, being controlled by clear judicial precedent, and is distinctly subsidiary to the more serious issues involved in *Braden*. While the two pending cases raise the pertinency of the questions to the subject under inquiry (which is closely related to the issue in this case whether the witness was apprised of the subject under inquiry) and alleged violations of the witness' First Amendment rights, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 127–134), depends on the particular facts of each case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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